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IN THE

Supreme Court of the United States

October Term, 1963

No. 477

In the Matter of the Application of

JOSEPH LEWIS and ALFRED L. KLEIN,
Petitioners,

For an Order Against

JAMES E. ALLEN, Jr., Commissioner of Education of the State of New York,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the order of the Court of Appeals of the State of New York in the within action, dated June 10, 1964, affirming the order of the Appellate Division of the Supreme

Court of the State of New York, Third Judicial Department, dated September 12, 1960 which, in turn, affirmed an order of Special Term of the Supreme Court of the State of New York, Albany County, dismissing on the merits the application of petitioners to obtain an order directing the respondent Commissioner of Education to revoke his regulation interpolating the phrase "under God" into the Pledge of Allegiance to the United States flag for use in public school class and assembly rooms, upon the ground that the words of said Pledge have been unconstitutionally modified thereby.

Opinions Below

The opinion of Special Term of the Supreme Court of the State of New York is reported in 5 Misc. 2d 68. The opinion of the Appellate Division of the Supreme Court is reported at 11 App. Div. 2d 447. No opinion was rendered by the Court of Appeals.

Jurisdiction

The order of the Court of Appeals of the State of New York was dated June 10, 1964. Jurisdiction is conferred on this Court by 28 U. S. C. §1254 (3).

Questions Presented for Review

1. Whether the defendant's published recommendation to the public schools under his jurisdiction that the Pledge of Allegiance to the flag of the United States, containing

the words "under God", be used in school classrooms violates the provisions of the First Amendment to the Constitution of the United States.

2. Whether the decisions of the New York Courts are inconsistent with the determinations of this Court in *Matter of Engel* v. *Vitale*, 370 U. S. 421 and *Abington School District* v. *Schempp*, 374 U. S. 203.

Statutes Involved

The pertinent statutory provisions are the following:

1. That portions of the First Amendment to the Constitution of the United States, made applicable to the states by the Fourteenth Amendment, providing that:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; * * *".

2. Subdivision "1" of §802 of the Education Law of the State of New York, providing:

> "It shall be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a daily pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools."

3. Subdivision "5" of Article XVI of the Regulations of the Commissioner of Education of the State of New York, promulgated in 1956, providing:

> "Pledge to the flag. It is recommended that schools use the following pledge to the flag:
>
> 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisibl with liberty and justice for all'."

Statement

The petitioners in this proceeding, including the parents of children attending the public schools in Richmond County, New York, brought a proceeding against the New York Commissioner of Education for an order directing him to revoke a regulation promulgated by him directing the public school classroom use of a Pledge of Allegiance to the flag of the United States containing the phrase "under God". Petitioners' objections to the use of such Pledge was that it constituted a religious exercise and interfered with the parental right to dictate the religious or irreligious philosophy of children.

The respondent Commissioner of Education moved to dismiss the petition and Special Term of the New York Supreme Court granted said motion rendering an opinion appearing herein at pages 7-16. Upon petitioners' appeal, said order of dismissal was affirmed by the Appellate Division of the Supreme Court with an opinion appearing herein at pages 17-22. A subsequent appeal to the Court of

Appeals of New York resulted in a unanimous affirmance without opinion.

The opinions of the lower courts of New York were rendered before this Court decided *Matter of Engel* v. *Vitale*, 370 U. S. 421 and *Abington School District* v. *Schempp*, 374 U. S. 203. The decision of Special Term was predicated upon the seemingly inapt conception that the First Amendment prohibits only the establishment of a State Religion and the doubtful conclusion that the recitation of the Pledge of Allegiance was not compulsory upon school children. The Appellate Division opinion likewise emphasized the absence of compulsion and relied heavily upon the accommodation doctrine expressed in *Zorach* v. *Clauson*, 343 U. S. 306 to validate the use of the challenged Pledge. Neither Special Term nor the Appellate Division gave any recognition to the contention that the grievance complained of found justification in that construction of the "establishment" clause of the First Amendment which would prohibit any governmental aid or advance to religion without regard to the question of conmpulsion.

Reasons Relied on for Granting the Writ

1. The question herein presented is of such importance as to warrant a determination by this Court because the broad and fundamental issue of separation of church and state is involved. For public school children to be required to learn and vocally express a belief in the existence of God by regularly reciting the Pledge of Allegiance recommended by respondent poses serious questions of First Amendment violations.

2. The determination of the New York courts in the instant case appears to be inconsistent with the decisions of this Court in *Matter of Engel* v. *Vitale*, 370 U. S. 421 and *Abington School District* v. *Schempp*, 374 U. S. 203, which prohibited the conduct of religious exercises in public school classrooms. The phrase "under God" in the recommended Pledge of Allegiance expresses a religious conception. Its repeated use in the schoolrooms has the necessary effect of advancing religion and thereby appears to fail the test for First Amendment validity formulated by Mr. Justice Clark in the *Schempp* case. The seeming unconstitutionality of the respondent's recommendation is not saved by the claim that no coercion is practiced upon school children. The court decisions below which, rightly or wrongly, emphasize that conclusion do not, nevertheless, cope with this Court's rulings regarding the significance and reach of the "establishment" clause of the First Amendment and to that extent, at least, do not follow the law of the land.

Conclusion

For the reasons stated above, it is respectfully submitted that this petition should be granted.

Respectfully submitted,

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Opinion of Special Term of the Supreme Court

By Mr. Justice Bookstein

This is a proceeding by petitioners under subdivision 1 of section 1296 of article 78 of the Civil Practice Act to compel respondent, the Commissioner of Education of the State of New York, to perform a duty which allegedly he has failed to perform. The duty which petitioners would compel him to perform is to revoke and rescind a certain regulation allegedly enforced in the public schools of the State of New York, "requiring the use of the phrase 'under God' in the Pledge of Allegiance to the flag of the United States of America, and directing him to reestablish the use of said pledge, without that phrase".

The papers fail to indicate any demand or request for revocation or rescission prior to the commencement of this proceeding.

No statutory duty has been shown which requires respondent to rescind or revoke the regulation. So it cannot be said that respondent has failed to perform a duty imposed upon him by statute.

But petitioners contend that such duty is imposed on respondent by the First and Fourteenth Amendments to the United States Constitution and by section 3 of article I and section 4 of article XI of the New York State Constitution.

Section 802 of the Education Law, as amended by chapter 177 of the Laws of 1956, provides, in part: "1. It shall

be the duty of the commissioner of education to prepare, for the use of the public schools of the state, a program providing for a salute to the flag, *and a pledge of allegiance to the flag,*[1] for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such school". (Emphasis supplied.)

Respondent had, prior to the 1956 amendment, promulgated regulation 150 (par. 5) providing: "It is recommended that the schools use the following pledge to the flag: 'I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation, indivisible, with liberty and justice for all'."

This recommended pledge is the precise pledge enacted by the Congress of the United States. (U. S. Code, tit. 36, §172.)

On June 14, 1954, the Congress amended section 172 by inserting, between the words "Nation" and "indivisible", the words "under God". The pledge of allegiance to the flag as amended by the Congress now reads: "I pledge allegiance to the flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all."

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1. Italicized words were added to section 802 by chapter 177 of the Laws of 1956.

Thereafter respondent amended paragraph 5 of regulation 150, recommending a pledge in the words enacted by the Congress.

Petitioners object to the use of the words, "under God" in the pledge of allegiance.

They have no objection to the former pledge but contend that respondent has the duty to revoke this revised regulation, deleting the words "under God" from the pledge recommended for use in the public schools and this duty petitioners say he has failed to perform.

It is clear that in making and amending regulation 150 in accordance with the Education Law and with an act of Congress, respondent *was* performing his duties.

Respondent has made a regulation pursuant to express direction of a statute of this State and in conformance with a law of the United States. How then can he be charged with failing to perform his duty?

Petitioners' contention, in final analysis, is that the present pledge of allegiance to the flag of the United States violates the First Amendment to the United States Constitution (which by the 14th Amdt. binds this State), and, also violates the New York State Constitution. Therefore, petitioners contend respondent cannot and should not perform the duties which the Legislature of the State of New York has directed him to perform, since, by amending the regulation to include the words "under God", the regulation now contravenes the First Amendment.

To sustain that contention implies respondent has not only the right, but the duty, to determine the constitutionality of an act of the State Legislature or of the Congress and to refuse to perform, where in his judgment, such act is unconstitutional.

Clearly, this is in the exclusive domain of the judiciary. It is not a function of administrative officials.

As I read the petition, no claim is asserted that either the act of the Legislature or the act of Congress above referred to violates the Constitution of the United States or of the State of New York. The petition confines its charge to the regulation promulgated by the respondent and asserts the regulation contravenes those Constitutions.

The First Amendment to the United States Constitution, so far as pertinent, provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The Fourteenth Amendment makes the First Amendment applicable to and binding on the State of New York.

Section 3 of article I of the New York Constitution provides: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind; and no person shall be rendered incompetent to be a witness on account of his opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or

justify practices inconsistent with the peace or safety of this state".

Section 4 of article XI of the New York Constitution provides: "Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning".

Petitioners claim that freethinkers, nonbelievers, atheists and agnostics cannot be compelled to recite the present pledge of allegiance because it includes the words "under God", and such compulsion violates the aforesaid constitutional provisions.[2]

It is elementary that the First Amendment to the United States Constitution prohibits the establishment of

2. The House of Representatives Report No. 1693 83rd Cong. 2d Sess. on the bill to amend the pledge of allegiance by the inclusion of the words "under God" demonstrates that the Committee on the Judiciary considered the question of constitutionality. Its report set forth the purpose of the law and concluded the act was constitutional, emphasizing it was inspired by the fact that "At this moment of our history * * * our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own".

Concededly, that determination of constitutionality is not binding but it does signify that the matter was carefully considered.

religion and erects a wall of separation between church and State which may not and must not be breached.

In *McCollum* v. *Board of Educ.* (333 U. S. 203) the public schools were used for avowed religious instructions by members of the Protestant, Roman Catholic and Jewish faiths, although attendance at such instruction was only on request of parents. The United States Supreme Court declared the system unconstitutional because public school buildings were there being used for dissemination of religious doctrines at the taxpayers' expense.

In *Board of Educ.* v. *Barnette* (319 U. S. 624) the United States Supreme Court, at page 638, indicated approval of the Congressional enactment of the pledge of allegiance but declared the West Virginia flag salute law unconstitutional. In that instance, however, the salute to the flag was *compulsory*. The court pointed out at page 629: "Failure to conform is 'insubordination' dealt with by expulsion. Readmission is denied by statute until compliance. Meanwhile the expelled child is 'unlawfully absent' and may be proceeded against as a delinquent. His parents or guardians are liable to prosecution, and, if convicted are subject to fine not exceeding $50 and jail term not exceeding thirty days".

The regulation under attack here has no compulsory aspect. No penalties attach to a failure or refusal to recite the pledge. The pledge is made voluntarily and no penalties are imposed for noncompliance.

There are two general bases for attacking a statute or regulation on the grounds that it violates the First Amendment to the United States Constitution or the sections of the New York Constitution heretofore referred to:

First: Where a person is required to submit to some religious rite or instruction or is deprived or threatened with deprivation of his freedom for resisting that unconstitutional requirement; Second: Where a person is deprived of property for unconstitutional purposes (such as direct or indirect tax to support a religious establishment). (See concurring opinion of Mr. Justice Jackson in the *McCollum* case, *supra*, pp. 232-233.)

Here, the second basis cannot be successfully urged. No tax or deprivation of property is involved whether or not the words "under God" are used in the pledge. We are, therefore, obliged to consider whether the first basis supports petitioners' contention.

If I properly apprehend the intent, design and purposes of the First Amendment, it was conceived to prevent and prohibit the establishment of a *State Religion*; it was not intended to prevent or prohibit the growth and development of a *Religious State.*

This concept finds judicial support in *Holy Trinity Church* v. *United States* (143 U. S. 457, 470) where the court says "this is a religious nation".

In 1951, that court said in *Zorach* v. *Clauson* (343 U. S. 306, 313): "We are a religious people whose institutions presuppose a Supreme Being".

The Declaration of Independence refers to "the Supreme judge of the world", and "the protection of Divine Providence". Lincoln, at Gettysburg, spoke of "this nation, under God". Even the preamble to the New York Constitution expresses gratitude "to Almighty God for our Freedom". Indeed, the presidential oath of office concludes, "So help me, God". By act of Congress, our coins are inscribed, "In God we trust". (U. S. Code, tit. 31, §324)

If petitioners' contention be sound, it may be wondered whether the public school curriculum might properly include the Declaration of Independence and the Gettysburg Address. Could "America" ("Protect us by thy might, Great God, our King!") be sung in a public school without offending the First Amendment? And might not the presidential oath of office have questionable constitutional status?

These questions find their answer in House Report No. 1693, note 2 (*supra*). There, the committee on judiciary notes: "The Supreme Court has clearly indicated that the references to the Almighty which run through our laws, our public rituals, and our ceremonies in no way flout the provisions of the first amendment (*Zorach* v. *Clauson*, 343 U. S. 306, 312-313). In so construing the first amendment, the Court pointed out that, if this recognition of the Al-

mighty was not so, then even a fastidious atheist or agnostic could object to the way in which the Court itself opens each of its sessions, namely, 'God save the United States and the Honorable Court' (id., 313)".

But evidently relying on Mr. Justice Frankfurter's concurring opinion in the *McCollum* case (*supra*, p. 227), petitioners urge there is a compulsion which operates and, in substance, "requires" that a child recite the words "under God", when reciting the pledge of allegiance. In the circumstances of the *McCollum* case, Mr. Justice Frankfurter said, "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children".

Whatever the force of that argument in the circumstances of the *McCollum* case, here, the child of a non-believer may simply omit the words, "under God", in reciting the pledge. His "non-conformity", if such it be, will not in the circumstances of this case set him apart from his fellow students or bring "pressure" to bear in any real sense.

But assuming the contrary, Mr. Justice Jackson's concurring opinion in the *McCollum* case is nicely apposite. He there observed (pp. 232-233): "The complaint is that when others join and he does not, it sets him apart as a

dissenter, which is humiliating. Even admitting this to be true, it may be doubted whether the Constitution which, of course, protects the right to dissent, can be construed also to protect one from the embarrassment that always attends nonconformity, whether in religion, politics, behavior or dress. Since no legal compulsion is applied to complainant's son himself and no penalty is imposed or threatened from which we may relieve him, we can hardly base jurisdiction on this ground".

To grant this application "would be preferring those who believe in no religion over those who do believe". (*Zorach* v. *Clauson, supra,* p. 314.) The First Amendment does not require this.

Petitioners' right to disbelieve is guaranteed by the First Amendment, and neither they nor their children can be compelled to recite the words "under God" in the pledge of allegiance. But the First Amendment affords them no preference over those who do believe in God and who, in pledging their allegiance, choose to express that belief.

Petition dismissed upon the merits, with costs. Submit order. All papers to attorney for Respondent.

Opinion of Appellate Division of the Supreme Court

GIBSON, J. Petitioners appeal from an order which dismissed their petition seeking relief in the nature of mandamus (Civ. Prac. Act, §1296, subd. 1; cf. §1284, subd. 3) to compel respondent Commissioner of Education to rescind as constitutionally invalid a regulation recommending the use in the schools of the pledge of allegiance to the flag in the form presently in general use (Regulations of Comr. of Educ. of State of N. Y., §150, subd. 5, as amd. Sept. 24, 1954) and to re-establish the use of the pledge in its prior form. The regulation is said to contravene the First Amendment to the Constitution of the United States as well as section 3 of article I and section 4 of article XI of the Constitution of the State of New York.

None of the procedural or other objections raised by respondent seem to us to be vital but since we go directly to the merits we do not determine them.

The Commissioner of Education is charged with "the duty * * * to prepare, for the use of the public schools of the state, a program providing for a salute to the flag and a pledge of allegiance to the flag, for instruction in its correct use and display and such other patriotic exercises as may be deemed by him to be expedient, under such regulations and instructions as may best meet the varied requirements of the different grades in such schools." (Education Law, §802, subd. 1.) In accordance therewith, the present amended regulation was promulgated as follows: "5. Pledge to the Flag. It is recommended that schools use the following pledge to the flag: 'I pledge allegiance

to the flag of the United States of America and to the Republic for which it stands, one Nation, under God, indivisible, with liberty and justice for all'." The words "under God" did not appear in the prior regulation, in which the pledge followed the form adopted by Federal enactment (U. S. Code, tit. 36, §172), but Congress added those words to section 172 by amendment of June 14, 1954, following which and consistently therewith, the Commissioner's regulation was amended and approved by the Board of Regents in its present form.*

So far as relevant here, the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"; and that interdiction is imposed upon the States by reason of the Fourteenth Amendment (*Everson* v. *Board of Educ.*, 330 U. S. 1; *Cantwell* v. *Connecticut*, 310 U. S. 296).

Appellants urge that in this case the contested regulation offends the constitutional provisions, first, as it involves "the use of the public schools—both physically and pedagogically—for the dissemination of purely religious dogma" and, second, as it imposes "an intolerable degree of compulsion upon the young children of non-believers * * * to listen to, learn and repeat thousands of times a religious concept which they repudiate and abhor."

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* Differing slightly from the language of section 172 in which no comma appears in the phrase "one Nation under God", the punctuation being deemed of some significance in the opinion of the Legislative Reference Service of the Library of Congress, appended to House Report No. 1693, May 28, 1954, of the Committee on the Judiciary.

We consider first the argument of compulsion or restraint. It was held, even before the addition of the words "under God", that the flag salute could not be made compulsory so as to require the participation of the members of a religious sect who viewed the ceremony as a form of idolatry offensive to their tenets and beliefs. (*Board of Educ.* v. *Barnette,* 319 U. S. 624). Respondent freely concedes, of course, that such compulsion would infringe upon the constitutional guarantees of freedom of religion; that the freedom thus protected includes the rights of nonbelievers as of believers (cf. *Zorach* v. *Clauson,* 343 U. S. 306, 314; *Everson* v. *Board of Educ.,* 330 U. S. 1, 18, *supra*); and that the children with whom the petition is concerned cannot be compelled to recite the pledge of allegiance. His position upon that issue is stated thus: "Respondent believes that a recitation, by children of that persuasion, of the Pledge of Allegiance, omitting the words 'under God' would be in complete compliance with any rule the school could make in this respect; similarly, it would be full compliance with any such rule, if the child were not to recite at all, while remaining present, or if the child were to leave the room altogether during such recitation." Assuming for the moment that these rights conceded to dissident students be given full and complete effect, there remains no element of compulsion within the intendment of the First Amendment. Indeed, it was recently held that the imposition of similar conditions would remove all objections on constitutional grounds to the action of a local board of education requiring the recital of the so-called Regents' prayer—of religious import and significance far greater

than that of the pledge of allegiance. (*Matter of Engel* v. *Vitale,* 18 Misc 2d 659, affd. 11 AD 2d 340; and, see, *Doremus* v. *Board of Educ.*, 5 N. J. 435, appeal dismissed 342 U. S. 429 as presenting no case or controversy within the appellate jurisdiction of the Supreme Court.) Upon the facts of this case, however, we find it unnecessary to remand, as was done in *Engel,* for proceedings contemplating the formal adoption of such conditions, as safeguards "intended to eliminate any element of coercion or compulsion upon the student with respect to the daily recitation of the prayer." (11 AD 2d 340, 341.) This proceeding, differing, from *Engel,* is not directed against a local or other school authority which has actually required the recital of the pledge, but is addressed to a regulation purely recommendatory. We may not assume present or future action by some school authority to effectuate the Commissioner's recommendation by means recognized by the courts and by the Commissioner as deprivative of constitutional privilege. If and when that unlikely action shall occur, it may be dealt with, directly and specifically. In this situation, therefore, we find no sound basis for any claim of coercion or pressure directed toward "an establishment of religion" or interfering with "the free exercise thereof".

Appellants' additional contention that the teaching and recitation of the pledge "involve" improper use of the schools for the dissemination of "religious dogma" seems likewise unfounded. The complete answer to this argument is to be found in the doctrine of accommodation enunciated in *Zorach* v. *Clauson* (343 U. S. 306, 313-314, *supra*). In

that case it was held (p. 312) that New York, by enacting the "released time" program to permit of religious education of school children without the school, had not "made a law respecting an establishment of religion". The court (pp. 312-313) said "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. * * * The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. * * * Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment."

We reach finally appellants' contention that the regulation infringes upon rights preserved by the Constitution of the State of New York. Section 3 of article I of that Constitution guarantees "free exercise and enjoyment of religious profession and worship, without discrimination or preferences"; and section 4 of article XI, also cited by appellants but of doubtful relevance here, forbids the use of public money or other property in aid of any denomina-

tional school or of any school "in which any denominational tenet or doctrine is taught". From our determination that the claim of unconstitutionality under the First Amendment cannot be sustained, it follows that the regulation does not contravene the like provisions of the State Constitution.

The order should be affirmed, with $10 costs.

BERGAN, P. J., COON, HERLIHY and REYNOLDS, JJ., concur.

Order affirmed, with $10 costs.